Thomas B. Mayhew (State Bar No. 183539)
tmayhew@fbm.com
Monali S. Sheth (State Bar No. 239511)
msheth@fbm.com
Farella Braun & Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Charles J. Cronan IV
(*Applying Pro Hac Vice*)
ccronan@stites.com
Oliver H. (Scott) Barber, III
(*Applying Pro Hac Vice*)
sbarber@stites.com
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352
Telephone: (502) 587-3400
Facsimile: (502) 587-6391

Attorneys for Defendant
BROWN-FORMAN CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DEBORAH di GRAZIA, Plaintiff, v. SAZERAC COMPANY, INC., BROWN-FORMAN, INC., AND TEQUILA HERRADURA, S.A. de C.V., Defendants.	Case No. 5:08-CV-01562-JW **DEFENDANT BROWN-FORMAN CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: May 11, 2009 Time: 9:00 a.m. Courtroom: 8, 4th Floor, San Jose Judge: Hon. James Ware

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS MATTER:

PLEASE TAKE NOTICE that on May 11, 2009, at 9:00 a.m. or as soon thereafter as this motion may be heard in Courtroom 8, 4th Floor, 280 S. First Street, San Jose, California, defendant Brown-Forman Corporation ("Brown-Forman")[1] will move to dismiss with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), the seventh and eighth causes of action asserted against Brown-Forman in Plaintiff Deborah di Grazia's First Amended Complaint.

Brown-Forman moves to dismiss with prejudice the seventh and eighth causes of action because they fail to state a claim upon which relief may be granted. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the pleadings on file, this Court's Order of December 16, 2008, oral argument of counsel, and such other materials and argument as may be presented in connection with the hearing on the motion.

STATEMENT OF THE ISSUE

Given the Court's ruling that Sazerac Company, Inc. ("Sazerac") did not breach its Payment Agreement with Plaintiff when it stopped making further payments to Plaintiff following Brown-Forman's purchase of Herradura's business assets and the right to distribute Herradura products in the United States, and absent any allegation that Brown-Forman engaged in wrongful conduct in connection with the purchase of Herradura or the distribution rights, can Plaintiff maintain a cause of action for intentional interference with contract or for violation of the California unfair competition law?

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[1] Brown-Forman Corporation is erroneously identified in the First Amended Complaint as Brown-Forman, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In a Complaint filed on February 20, 2008 (the "Initial Complaint"),[2] Plaintiff asserted, *inter alia*, claims of breach of contract and unjust enrichment against Sazerac, alleging that Sazerac unlawfully refused to make payments in accordance with a written agreement between the parties. On March 28, 2008, Sazerac filed a motion to dismiss the Initial Complaint.

On December 16, 2008, after briefing and oral argument, this Court entered an Order dismissing all claims asserted against Sazerac (hereinafter "Order"). (*See* Order at 1:20-21.) The Court dismissed with prejudice Plaintiff's claims for breach of express contract, breach of an implied covenant to continue purchasing Herradura products, and breach of third-party beneficiary rights. The Court dismissed with leave to amend Plaintiff's claims for breach of the implied covenant of good faith and fair dealing and unjust enrichment. As to the former claim, leave to amend was narrowly drawn. (*Id.* at 8:1-2 (dismissing claim for breach of the implied covenant because Plaintiff did not allege that the buyout payment received by Sazerac "was a sham and done to disguise the amounts owed due to purchases of Herradura Brands").) As to the claim for unjust enrichment, the Court granted leave to amend only "in relationship to any reassertion" of the claim for breach of the implied covenant of good faith and fair dealing. (*Id.* at 9:5-6.)

On January 15, 2009, Plaintiff filed a First Amended Complaint in this action, adding two new defendants, Brown-Forman and Herradura. The first six causes of action in Plaintiff's amended pleading are asserted only against Sazerac. Count Seven (tortious interference with contract) is asserted against Brown-Forman and/or Herradura. Count Eight (unfair business practices under Section 17200 of the California Business and Professions Code) is asserted against all defendants.

Plaintiff's Count Seven is derived entirely from her deceased husband's agreement with Sazerac (referred to in the Court's Order as "Payment Agreement"). Count Seven should be dismissed with prejudice because: (1) this Court already has ruled that Sazerac's termination of its distribution agreement with Herradura (referred to in the Order as "Definitive Agreement") did not breach Sazerac's Payment Agreement with Plaintiff; and, (2) absent any breach of the underlying contract between Sazerac and the Plaintiff, Plaintiff cannot establish a key element of any cause of action for intentional interference with contract. Moreover, the allegations against Brown-Forman in Count Seven, on their face, fail to assert a breach. Instead, they merely recite a legal and legitimate business transaction in which Brown-Forman, the new owner of the Herradura brands, acquired Sazerac's right to distribute those brands in the United States.

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[2] The Complaint was originally filed in Monterey County Superior Court. On March 31, 2008, Sazerac removed the action to this Court.

Plaintiff's Section 17200 claim in Count Eight should be dismissed with prejudice as to Brown-Forman because it simply repackages Plaintiff's allegations in Counts One through Six against Sazerac. In Count Eight, Plaintiff has not pled any factual predicate for relief under Section 17200. Instead she pleads only generalized allegations of unlawful, unfair, or fraudulent conduct and thereby completely fails to satisfy the heightened pleading standards applicable to Section 17200 actions. Therefore, Count Eight should be dismissed as to Brown-Forman with prejudice.

II. STATEMENT OF RELEVANT FACTS

Defendants Herradura and Sazerac entered into an agreement on October 21, 1991, by which Sazerac was appointed the exclusive United States importer and distributor of Herradura tequila brands (the "Definitive Agreement"). The initial term of the Definitive Agreement was 20 years. (Definitive Agreement, ¶ 5.) However, both Herradura and Sazerac had the option to terminate the Definitive Agreement before expiration of the 20 year term. (*Id.* at ¶ 21; *see also* Order at 6:15-16.)

Concurrent with the Definitive Agreement, Sazerac and Mr. Loris di Grazia, Plaintiff's now-deceased husband and predecessor in interest, entered an agreement on October 21, 1991, under which Mr. di Grazia relinquished his exclusive representation rights to Herradura's products in return for an initial payment and subsequent payments based upon Sazerac's purchases of Herradura products (the "Payment Agreement").[3] (*See* Order at 2:5-8.) Under the

[3] The Definitive Agreement and the Payment Agreement are attached to and incorporated by

Payment Agreement, Mr. di Grazia agreed to relinquish his rights as Herradura's "exclusive representative" in the United States. (Payment Agreement at 1.) In exchange, Sazerac agreed to pay Mr. di Grazia "an initial payment upon the effective date of the Definitive Agreement" and "subsequent payments ***based upon purchases*** of the Brands by Sazerac." (*Id.* at ¶ 1(b)(ii) (emphasis added); *see also* Order at 2:7-8, 5:2-7.) More specifically, as the Court already has found, "… the Payment Agreement provided that Plaintiff would receive a minimum payment of $2.5 million in the first six years of the contract, but after that, Plaintiff would be entitled to payments based … solely on Defendant's purchases of Herradura products." (*See* Order at 9:24-26, 10:1.)

As Plaintiff acknowledges, "[f]or approximately 16 years, Sazerac made purchases of Herradura Brands, and it made regular payments to Mr. di Grazia." (First Am. Compl. ¶ 26.) In early 2006, Mr. di Grazia passed away. (*Id.* at ¶ 27.) Thereafter, Sazerac continued to purchase Herradura tequila and continued to make corresponding payments to Plaintiff pursuant to the terms of the Payment Agreement. (*Id.*)

Also in 2006, Brown-Forman, a wine and spirits producer with worldwide distribution, acquired Herradura's business assets, including its agave fields, distillery, and tequila brands. Plaintiff describes it as Brown-Forman becoming "Herradura's corporate parent." (*Id.* at ¶¶ 4, 29; Order at 2:15.) Consequently, Brown-Forman negotiated with Sazerac, Brown-Forman's competitor in the spirits business, to secure Sazerac's remaining rights to distribute what was then Brown-Forman's brand – Herradura tequila – in the United States. Plaintiff alleges in Count Seven that "[f]ollowing its acquisition of Herradura, Brown-Forman no longer required the distribution services provided by Sazerac because it could distribute the Herradura Brands on its own." (*Id.* at ¶ 78.) Subsequently, Sazerac "negotiated and entered into an agreement … to sell to Brown-Forman its remaining rights under the [Definitive] Agreement." (*Id.*) Sazerac thereafter informed Plaintiff that it would not make further payments under the Payment Agreement because it "was no longer making any purchases from Herradura …" (*Id.* at ¶ 31.)

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reference into the First Amended Complaint. (First Am. Compl. ¶¶ 23, 24.)

The Court's Order includes a number of critical findings regarding the conduct of the parties, the terms of the Payment Agreement between Sazerac and Mr. di Grazia, and the Definitive Agreement between Sazerac and Herradura which completely undercut Plaintiff's present claims against Brown-Forman:

- The Definitive Agreement simply acknowledges that [Sazerac] would make payments to Plaintiff based on [Sazerac's] purchases of Herradura products. (Id. at 10:23-24.)
- "[T]he Definitive Agreement expressly provides that the parties may terminate the agreement." (Id. at 6:22-23 (citing Definitive Agreement ¶ 21) (emphasis added).)
- "Under the terms of the Payment Agreement, after the initial payment, [Sazerac's] obligation to compensate Plaintiff is dependent upon purchases of Brands by [Sazerac] from Herradura. The Payment Agreement does not require [Sazerac] to purchase a fixed or minimum quantity of Herradura products." (Order at 6:11-14.)
- "The clear import of the Payment Agreement is that [Sazerac] was free to reduce its purchases of Herradura products without incurring further obligations to Plaintiff." (Id. at 10:1-2.)
- "The Court finds that [in terminating the Agreement] the parties to the Definitive Agreement were conducting themselves in a manner allowed by their Agreement." (Id. at 8:5-6.)
- "[Sazerac's] act of terminating the distributorship does not violate the terms of the Payment Agreement. Furthermore, the Payment Agreement does not require [Sazerac] to pay any money unrelated to purchases of Herradura Brands to Plaintiff upon termination of the Definitive Agreement. Therefore, Plaintiff cannot state a claim for breach of express contract." (Id. at 7:4-7 (emphasis added).)

III. LEGAL STANDARDS UNDER RULE 12(B)(6)

Brown-Forman incorporates by reference the Court's recitation of the legal standards under Rule 12(b)(6) set forth in its December 16, 2008 Order. (*See* Order at 3:2-19.) Of particular importance here are the Supreme Court's requirement that Rule 12(b)(6) requires that the plaintiff provide more than "a formulaic recitation of the elements of a cause of action [and that] [f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and the principle that "[w]hen a complaint rests on a written contract and that contract is incorporated in and attached to the complaint, the court is not required to 'accept as true conclusory allegations in the complaint which are contradicted by the clear import of the contract itself.'" (*See* Order, p. 3, n.2 (quoting *Wyler Summit Partnership v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658, 665 (9th Cir. 1998)).)

IV. ARGUMENT

A. Plaintiff Cannot State a Claim for Tortious Interference with Contract.

Under California law, a claim for tortious interference with contract requires that the Plaintiff allege: (1) the existence of a valid contract between Plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1105 (9th Cir. 2007) (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 392 (1995)). Plaintiff's claim of tortious interference must be dismissed because, as a matter of law, she has not, and cannot state a claim upon which relief may be granted.

As a preliminary matter, Plaintiff fails to satisfy her burden of pleading the third and fourth elements of an intentional interference with contract claim – "an intentional act designed to induce a breach or disruption of the contractual relationship" and "actual breach or disruption of the contractual relationship." *See Della Penna*, 11 Cal.4th at 392. With respect to the third element, Plaintiff's Count Seven altogether fails to allege that there was an intentional act designed to induce a breach or an "actual breach" or "disruption" of the Sazerac/di Grazia Payment Agreement. The only advertent acts Plaintiff attributes to Brown-Forman, *i.e.*, acquiring Herradura and consequently purchasing from Sazerac the right to distribute Herradura products, constitute legal and legitimate business conduct. Plaintiff makes no attempt to frame the Herradura acquisition as improper or intended to harm the di Grazias' interests. Further, Plaintiff concedes that there was a legitimate business purpose for Brown-Forman's purchase of the distribution rights, noting that, after Brown-Forman acquired Herradura, it no longer required the distribution services provided by Sazerac because Brown-Forman could distribute the Herradura brands on its own. Because the Sazerac/Herradura Distribution Agreement prevented Brown-Forman from unilaterally terminating Sazerac's rights, Brown-Forman sought to buy the rights to distribute the Herradura brands by purchasing those rights from Sazerac. (First Am. Compl. ¶ 78.)

Plaintiff's only effort to satisfy the third element of tortious interference – an intentional act designed to induce a breach – is her stated belief that Brown-Forman "induced" Sazerac to enter into a buy-out agreement for the remaining term of the Distribution Agreement so that Brown-Forman could profit by distributing the Herradura brands itself. (*Id.* at ¶ 79.) But Plaintiff fails to assert (and, as explained below, cannot assert) that Brown-Forman intended to induce a ***breach***. On the contrary, her immediately preceding allegation recognizes the perfectly legitimate business reason for Brown-Forman's purchase of the remaining term of Sazerac's right to distribute the Herradura brands which Brown-Forman had purchased as part of Herradura's business assets. *C. Pappas Co., Inc. v. E. & J. Gallo Winery*, 610 F. Supp. 663, 669 (E.D. Cal. 1985) (citing *Charles Chapman Building Co. v. California Mart*, 2 Cal.App.3d 846 (1969)) ("[W]here no breach of contract is shown, the law recognizes a more extensive privilege to interfere with business relations than where a breach appears. Further, if the interference involves no more than recognized trade practices, such as advertising, solicitation or reduction of prices, a competitor's loss as a result of the competition is not actionable.")

Even assuming, as Plaintiff alleges, that Brown-Forman "knew" that its purchase of Sazerac's distribution rights would interfere with the Payment Agreement between Sazerac and Plaintiff, (First Am. Compl. ¶ 80), Plaintiff stops short of accusing Brown-Forman of taking over Herradura's distribution because it intended to harm the di Grazias rather than because of its intent to profit from the transaction. Instead, Plaintiff simply alleges that Brown-Forman's actions "resulted in the elimination of payments to Plaintiff under the Payment Agreement." (*Id.*, ¶ 81.) For obvious reasons, an "elimination of payments" is not the same thing as a breach of a contract. Because Plaintiff has failed to include an allegation that Brown-Forman committed an intentional act designed to induce a breach, Plaintiff has not pleaded a valid third element of a claim of intentional interference with contract and Count Seven should be dismissed.

Plaintiff's intentional inference claim should be dismissed not just because Plaintiff failed to allege that Brown-Forman "intended to induce a breach." Even if Plaintiff had adequately pleaded a tortious inference with contract claim (which she has not), Count Seven should be dismissed because this Court already has held as a matter of law that there was no breach of the contract between Plaintiff and Sazerac, and thus Plaintiff cannot possibly satisfy the fourth element under *Della Penna*. This Court previously dismissed with prejudice Plaintiff's claim against Sazerac for breach of the same contract on which Plaintiff now bases her claims against Brown-Forman. In its Order at 7:7-8, this Court found that "the Definitive Agreement expressly provides that the parties may terminate the agreement," *id.* at 6:22-23 (citing Definitive Agreement ¶ 21); that, in terminating the agreement, "the parties to the Definitive Agreement were conducting themselves in a manner allowed by their Agreement" (*Id.* at 8:5-6); and, that "terminating the distributorship does not violate the terms of the Payment Agreement," *id.* at 7:4-5. Therefore, "**Plaintiff cannot state a claim for breach of express contract**." (*Id.* at 7:7 (emphasis added).)

Because the Sazerac/di Grazia Payment Agreement was not breached, there cannot be a claim for tortious interference with that agreement. *AIG Retirement Services, Inc. v. Altus Finance S.A.*, 2006 U.S. Dist. LEXIS 97707 at * 29, n.10. (C.D. Cal. 2006) (citing *Farmers Ins. Exchange v. State of California*, 175 Cal.App.3d 494, 506 (1986) ("Where, as here, the contract allegedly interfered with is not breached, there can be no interference with contract cause of action."). The Court's ruling that there was no breach means that, as a matter of law, Plaintiff cannot establish a key element of her claim. Accordingly, the Court should dismiss Count Seven.

To the extent that Plaintiff contends that Count Seven encompasses a cause of action against Brown-Forman for tortious interference with prospective economic relations, such a claim is barred by the Court's ruling that Sazerac's termination of the Definitive Agreement after Brown-Forman purchased Sazerac's distribution rights was appropriate and consistent with the terms of the Definitive Agreement. Here, Plaintiff has not alleged and cannot argue that Brown-Forman's conduct – acquiring Herradura's tequila business and purchasing Sazerac's remaining distribution rights to the Herradura brand – was objectively "wrong." A plaintiff asserting a tortious interference with prospective economic relations claim must identify "wrongful" conduct as part of her claim. *See Della Penna*, 11 Cal.4th at 393 ("[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself.") (internal citations omitted). Plaintiff herself has recognized the reasonable, lawful reason behind Brown-Forman's acquisition of the distribution rights when she described Sazerac's distribution services as "no longer required" after Brown-Forman's purchase of Herradura. (First Am. Compl. ¶ 78.) Absent any allegation that Brown-Forman's actions were wrongful by some measure beyond the fact that they resulted the "elimination of payments" to Mrs. di Grazia, this claim should be dismissed.

California law also recognizes a "competition privilege" where "(a) the relation [between the competitor (Sazerac) and third person (di Grazia)] concerns a matter involved in the competition between the actor (Brown-Forman) and the competitor (Sazerac), and (b) the actor (Brown-Forman) does not employ improper means, and (c) the actor (Brown-Forman) does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's (Brown-Forman's) purpose is at least in part to advance his interest in his competition with the other." *Bed, Bath & Beyond of La Jolla v. La Jolla Vill. Square Venture Partners*, 52 Cal.App.4th 867, 880 (1997) (citations omitted). Here, as Plaintiff's pleadings acknowledge, Brown-Forman's acquisition of the Herradura distribution rights was simply a matter of furthering its own economic interests because Sazerac's services were "no longer required." In sum, Plaintiff's allegations and the Court's previous findings also establish that Brown-Forman's conduct is privileged and non-actionable.

B. Plaintiff Cannot State a Claim Under Section 17200.

Count Eight similarly fails to state a claim upon which relief may be granted. Plaintiff here attempts to organize her general theme – that she has been treated unfairly by Sazerac – into a claim under California Business and Professions Code Section 17200 (generally referred to as the unfair competition law, or UCL). The UCL prohibits unfair competition, which embraces anything that can properly be called a business practice that at the same time is forbidden by law. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1143 (2003). In order to recover under Section 17200, a Plaintiff must assert that it suffered harm on account of an unlawful, unfair, or fraudulent business act or practice. *Hull v. D & J Sports, Inc.*, 2004 U.S. Dist. LEXIS 15798, *4 (N.D. Cal. 2004) (citing *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35

Cal.3d 197 (1983)). As discussed below, Plaintiff's UCL claim should be dismissed as a matter of law because it seeks a remedy not permitted under the statute, is insufficiently pled, and suffers from the same fundamental defect as Count Seven.

1. Plaintiff Seeks an Impermissible Remedy.

Plaintiff's Section 17200 claim also suffers from the elementary flaw that the remedy she seeks in paragraph 87 of her amended pleading, *i.e.*, "restitution or disgorgement of any profits Sazerac, Brown-Forman and/or Herradura received as a result of their unlawful, unfair or fraudulent business practices," is not available in actions brought under this statute. Plaintiff does not allege that Brown-Forman received money to which Plaintiff may have been entitled under the Payment Agreement. Nor is it alleged that Plaintiff gave Brown-Forman money that it should now return. Any money Brown-Forman made from Herradura products came as the result of its own sales of those products. Plaintiff never possessed the money she now seeks from Brown-Forman under Count Eight. Therefore, her interest in the money at issue is non-restitutionary. That is, she has no vested ownership interest in the money she seeks to recover from Brown-Forman, and in reality wants Brown-Forman to disgorge its profits from the sale of Herradura products. Disgorgement of this type is not a remedy available under Section 17200. *See Korea Supply Co.*, 29 Cal.4th at 1151 ("The nonrestitutionary disgorgement remedy sought by plaintiff closely resembles a claim for damages, something that is not permitted under the UCL.").

2. Plaintiff's UCL Claim is Inadequately Pled.

Under California law, the pleading standards are heightened for claims brought under the UCL, and the Plaintiff "must state with reasonable particularity the facts supporting the statutory elements of the violation." *Silicon Knights v. Crystal Dynamics*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) (quoting *Khoury v. Maly's of California*, 14. Cal.App.4th 612, 619 (1993)). Here, Plaintiff's claim that Brown-Forman violated the UCL is generalized and unsupported by any factual averments. Indeed, Plaintiff's UCL claim is a classic *ipse dixit*. Without elaboration, Plaintiff alleges that "Brown-Forman and/or Herradura's conduct constitutes unlawful, unfair, or fraudulent business practices within the meaning of Business and Profession's [*sic*] Code § 17200." (First Am. Compl. ¶ 86.) Because Plaintiff fails to plead a single fact in support of her

Section 17200 claim, she fails to satisfy this heightened pleading requirement and the claim should be dismissed.

3. Plaintiff Has Not Identified a Factual Predicate for a Valid UCL Claim.

Even assuming that Plaintiff had properly pleaded her Section 17200 claim (and she hasn't) and that the remedy she seeks is permitted under the statute (and it's not), Plaintiff's claim fails because she has not identified any predicate offenses that might give rise to a cause of action under the UCL.

a. *Plaintiff Cannot State a Claim for an Unlawful Business Act.*

Under Section 17200, "[a]n unlawful business practice or act is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Klein v. Earth Elements, Inc.*, 59 Cal.App.4th 965, 969 (1997) (citing *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1992)). A claim for an unlawful business act requires an allegation of a predicate offense. *Id.* (citing *State Farm, Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093, 1101-1103 (1996) (citations omitted) ("Laws that have been enforced under section 17200's 'unlawful' prong include state antidiscrimination laws; state antitrust laws; state criminal laws; state environmental protection laws; state fish and game laws; state housing laws; state labor laws; and state vehicle laws.") Plaintiff's eighth cause of action fails to allege any specific predicate offense for her Section 17200 claim.[4] Brown-Forman has been brought into this lawsuit only as a result of its lawful acquisition of Herradura's business, and its subsequent purchase from Sazerac of the right to distribute its own product. Accordingly, to the extent Plaintiff invokes the "unlawful" prong of the statute, her claim should be dismissed for failure to adequately plead violation of a predicate offense.

b. *Plaintiff Cannot State a Claim for an Unfair Business Act.*

Under Section 17200, an unfair business practice or act occurs when an act or practice "offends an established public policy" or when the practice is "immoral, unethical, oppressive,

[4] If Plaintiff insufficiently pled Count Eight is read to allege tortious interference as its predicate offense, this cause of action is flawed for the same reasons as Plaintiff's Count Seven, and should be dismissed.

unscrupulous or substantially injurious to consumers." *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008) (citing *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App.3d 509, 530 (1984)). Determination of whether a business act is "unfair" under Section 17200 "entails examination of the impact of the practice or act on its victim . . . balanced against the reasons, justifications and motives of the alleged wrongdoer." *Klein*, 59 Cal.App.4th at 969 (internal citation omitted). "In general, the 'unfairness' prong has been used to enjoin deceptive or sharp practices." *Id.* at 970 (citing *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal.App.4th 1284, 1299, n.6 (1993)).

Plaintiff's eighth cause of action fails to allege that Brown-Forman's acquisition of the distribution rights to Herradura Brands was immoral, unethical, unscrupulous or substantially injurious to customers. This Court has already ruled that Sazerac's decision to surrender its distribution rights to Brown-Forman did not violate the Payment Agreement (Order at 7:4-7), and that the parties conducted themselves in a manner allowed by the Distribution Agreement. (*Id.* at 8:5-6.) Additionally, Plaintiff herself has recognized the justification for Brown-Forman's decision when she described Sazerac's distribution services as "no longer required" after Brown-Forman acquired Herradura. (First Am. Compl. ¶ 78.) As Plaintiff aptly describes the situation, Brown-Forman desired to end the distribution agreement with Sazerac "so that Brown-Forman could profit by distributing the Herradura Brands itself." (*Id.*) This is hardly a "deceptive" or "sharp" practice.

Finally, Plaintiff's bald assertion that Brown-Forman violated Section 17200 does not entitle her to a general "fairness" review under California law. *See Korea Supply Co.*, 29 Cal.4th at 1159 ("We reaffirm that an action under [Section 17200] is not an all-purpose substitute for a tort or contract action.") (internal citations omitted). Because she has not pleaded any facts that might satisfy the "unfair" prong of Section 17200, Plaintiff's claim should be dismissed as a matter of law.

c. *Plaintiff Cannot State a Claim for a Fraudulent Business Act.*

Under Section 17200, a fraudulent business practice or act is one that is likely to deceive the public. *Klein*, 59 Cal.App.4th at 970 (citing *Bank of the West v. Superior Court*, 2 Cal.4th

1254, 1267 (1992); *Saunders v. Superior Court*, 27 Cal.App.4th 832, 839 (1994)). This action "bears little resemblance to common law fraud or deception." *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal.App.4th 861, 888 (1999) (internal citation omitted). For example, in *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, the court held that an insurance company violated the fraud prong of Section 17200 by marketing an annuity policy that failed to disclose information regarding the premium charge and failed to describe the full economic consequences of early withdrawal of funds. 104 Cal.App.4th 508, 518 (2002). That the information about the premium charge was "not conspicuously set forth in the policy" and that the policy was "likely to deceive" brought the set of circumstances within the fraud prong of Section 17200. *Id.*

Here, Plaintiff's Count Eight does not include any allegation that the Defendants' conduct is likely to deceive the public. On the contrary, Plaintiff correctly identifies the straightforward reasoning behind Brown-Forman's decision to acquire the distribution rights to its own product. (First Am. Compl. ¶ 78.) Brown-Forman's acquisition of Herradura was a lawful transaction by a public company, and its purchase of the distribution rights from Sazerac already has been held to comport with Sazerac's obligations under the terms of the Definitive Agreement. (Order at 7:4-7.) Therefore, to the extent Plaintiff relies on the "fraudulent" prong of Section 17200, her claim should be dismissed as a matter of law.

V. CONCLUSION

For the above reasons, Brown-Forman respectfully request that the Court dismiss with prejudice Plaintiff's seventh and eighth causes of action in the First Amended Complaint.

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Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By:/s/ ____________________
Thomas B. Mayhew

Charles J. Cronan IV
Oliver H. (Scott) Barber, III
Stites & Harbison, LLC

Attorneys for Defendant
BROWN-FORMAN CORPORATION